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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-6174

CODY V. HIGGINS,

Appellant,

vs.

STATE OF MISSOURI,

Respondent.

On Appeal From the Supreme Court of Missouri, en banc.

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

Opinion Below---------- 1

Jurisdiction---------- 2

Constitutional and Statutory Provisions Involved- 3

Questions Presented---------- 3

Statement---------- 4

1. Appellant's Attack on the constitutionality of the mandatory punishment of Life imprisonment for First Degree Murder-------- 5

2. Appellant's Challenge to the Admissibility of the Identification Testimony as being unreliable as the result of suggestive police practices thereby depriving appellant of his right to a fair trial---------- 6

How The Federal Questions were Raised and Decided Below---------- 11

The Federal Questions are Substantial---------- 13

Conclusion---------- 19

Appendix

Opinion of the Supreme Court of Missouri, en banc ---------- 1-a

Notice of Appeal to the United States Supreme Court---------- 24-a

Table of Cases

Flournoy vs. Wiener, 321 U.S. 253 (1944)------- 2

Gregg vs. Georgia, 428 U.S. 152 (1976)--------- 17

Louisana ex rel Francis vs. Resweber, 329 U.S. 459 (1947)---------- 13

Manson vs. Brathwaite, 432 U.S. 98 (1977)----- 18

Neil vs. Biggers, 409 U.S. 188 (1972)--------- 17

Pennsylvania ex rel Sullivan vs. Ashe, 302 U.S. 51 at 55 (1937)---------- 14

Robinson vs. California, 370 U.S. 660 (1962)-- 13

Sibron vs. New York, 392 U. S. 40 (1968)------ 2

Simmons vs. United States, 390 U. W. 377 (1968)---------- 17

Trop vs. Dulles, 356 U. S. 86 (1958)---------- 14

United States vs. Wade, 388 U.S. 218 at 233 (1967)---------- 18

Woodson vs. North Carolina, 428 U.S. 280 (1976)---------- 15

Table of Statutory Provisions and Other Authorities

Sec. 559.007, R.S.Mo. (Supp. 1975)---------- 3

Sec. 559.009 (3), R. S. Mo. (Supp. 1975)----- 1,2,3,13, 14

28 U.S.C., § 1257 (2)---------- 1, 19

28 U.S.C., §2103---------- 3

American Bar Association Project on Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures (1968)---------- 16

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JURISDICTIONAL STATEMENT

Opinion Below

The opinion of the Supreme Court of Missouri, en banc, is reported at 592 SW2d 151 (Mo Banc 1979. It is set forth in the appendix, infra pp. 1a-23a.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (2), this being an appeal which draws into question the validity of Section 559.009 (3), R.S. Mo. (Supp. 1975) on the ground that it is repugnant to the Constitution of the United States.

Appellant was convicted of first degree murder in the Circuit Court of Clay County, Missouri. Following the jury verdict of guilty, the trial court assessed the mandatory punishment under Section 559.009 (3), R. S. Mo. (Supp. 1975) of life imprisonment. Appellant challenged the constitutionality of the mandatory punishment of life imprisonment for first degree murder by way of pre-trial motion, Motion for New Trial and on appeal. On appeal, the conviction and sentence was affirmed on December 6, 1979. Timely Notice of Appeal to this Court was filed in the Supreme Court of Missouri on December 27, 1979, infra pp. 24a-25a. Since the Supreme Court of Missouri, en banc, explicitly rejected Appellant's challenge to the constitutionality of Section 559.009 (3), R. S. Mo. (Supp. 1975), this matter is appropriately brought to this Court by appeal. Sibron vs. New York, 392 U. S. 40 (1968).

Further, appellant also seeks review in this Honorable Court of the decision of the Missouri Supreme Court, en banc, finding that the identification testimony admitted in appellant's trial was not violative of the due process clause of the Fourteenth Amendment of the United States Constitution notwithstanding Appellant's challenge that the identification testimony had been tainted and become unreliable by virtue of improper police suggestion. Appellant contends that this Court may properly consider on appeal this assignment of error though it could not independently be reviewed by appeal by virtue of this Court's decision in Flournoy vs. Wiener, 321 U. S. 253 (1944).

In the event that this Honorable Court does not consider appeal the proper mode of review for either of appellant's assigned errors, appellant requests that the papers whereupon this appeal is taken be regarded and acted upon as a petition

for writ of certiorari pursuant to 28 U. S. C. §2103.

Constitutional and Statutory Provisions Involved

This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

This case also involves Section 559.009 (3), R. S. Mo. (Supp. 1975), which provides:

> Persons convicted of capital murder shall be punished by death. Persons convicted of murder in the first degree shall be punished by the Division of Corrections during their natural lives. Persons convicted of murder in the second degree shall be punished by imprisonment by the Division of Corrections for a term of not less than ten (10) years.

The above penalty provision refers to the offense of first degree murder for which appellant was convicted. First degree murder under the then existing Missouri law was defined by Section 559.007, R. S. Mo. (Supp. 1975). This statute provides:

> The unlawful killing of a human being when committed without a premeditated intent to cause the death of a particular individual but when committed in the perpetration of or in the attempt to perpetrate arson, rape, robbery, burglary, or kidnapping as murder in the first degree.

Questions Presented

Whether Section 559.009, R. S. Mo. (Supp. 1975), which establishes a mandatory punishment of life imprisonment for murder in the first degree violates the prohibition against cruel and unusual punishment guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution in that said mandatory punishment prohibits the sentencing court from utilizing enlightened discretion to insure that the sentence fits not only the circumstances of the offense, but also the character and propensities of the offender?

Further, this appeal presents the question of whether the identification testimony offered in the trial against the defendant violated the due process clause of the Fourteenth Amendment to the United States Constitution in that its reliability had been tainted by impermissible police suggestion?

Statement

On February 11, 1977, Mr. and Mrs. Eric Agee stopped at the Price-Rite Market in Platte County, Missouri to purchase a postage stamp (R. 277). When Mr. Agee entered the store, he found Donna Parshall, the owner of the store, crouched on the floor behind the cash register and a gunman standing nearby (R. 279). As the gunman left the store with money in hand, he was observed by Miss Pamela Bowman who had just entered the parking lot (R. 315) and by Mrs. Agee who had remained outside the store in her vehicle (R. 294-295). After the gunman left, the police were contacted and Mrs. Parshall was taken to the hospital where she died as a result of a gunshot wound (R. 272). As the money in the cash register of the store was gone (R. 376), a robbery and felony murder investigation began.

The investigation focused on Cody V. Higgins, the appellant herein, and Edward Bowman when information was received from a confidential informant naming them as the responsible parties (R. 602). With this information, the police determined that Mr. Higgins had been stopped hours after the shooting in Johnson County, Kansas by the Kansas Highway Patrol for driving while intoxicated. At the time of the stop, his motor vehicle which he had been operating

was searched and a .22 caliber handgun was recovered (R. 366). The firearm was subjected to a firearms identification examination at the Regional Criminalistic Laboratory. This examination revealed that the handgun recovered was the firearm which shot the fatal bullet recovered from the body of Mrs. Parshall (R. 397-398).

Viewing the evidence and the inferences therefrom in a light most favorable to the prosecution, proof of appellant's guilt was three-pronged:

(1) The eyewitness identification testimony of Mrs. Agee (R. 293-300) and Miss Bowman (R. 313-319);

(2) The firearm's identification testimony of an employee of the Regional Criminalistic Laboratory (R. 387-403) and testimony of the Kansas Highway Patrolman (R. 331-355 ; 360-371) placing Mr. Higgins in possession of the alleged murder weapon hours following the offense; and

(3) A nine (9) page written confession given by Mr. Higgins in California subsequent to his arrest (R. 344-440; State exhibit 21).

Following hearings on appellant's numerous motions and trial, the jury after deliberating several hours returned a verdict finding Mr. Higgins guilty of first degree murder on November 30, 1977 (R. 644). The trial court overruled the appellant's Motion for New Trial on January 17, 1978 (R. 677) and then sentenced the appellant to the mandatory term of life imprisonment (R. 678).

Thereafter, Mr. Higgins was granted leave to appeal in forma pauperis and the judgment and sentence of the trial court was subsequently affirmed by the Missouri Supreme Court, en banc, on December 6, 1979.

1. Appellant's Attack on The Constitutionality of the Mandatory Punishment of Life Imprisonment For First Degree Murder

Prior to trial, the appellant challenged the constitutionality under the due process clause of the Fourteenth Amendment by way of a pre-trial Motion to Dismiss. This motion sought the dismissal of the information for the reason that the mandatory punishment of life imprisonment for first degree murder violated the prohibition of the Fourteenth Amendment to the United States Constitution of cruel and unusual punishment by virtue of the incorporation therein of the cruel and unusual punishment clause of the Eighth Amendment to the United States Consitution (R. 22-23). The trial court overruled this Motion (R. 38) and overruled the appellant's Motion for New Trial which raised this identical issue (R. 678). The same issue was raised on appeal and rejected by the Missouri Supreme Court, en banc, in their decision rendered on December 6, 1979.

2. Appellant's Challenge To The Admissibility Of The Identification Testimony As Being Unreliable As The Result Of Suggestive Police Practices Thereby Depriving Appellant Of His Right To A Fair Trial

Prior to trial, the appellant filed his Motion to Suppress Identification Testimony (R. 20-22). At the hearing on the Motion, part of the appellant's evidence in support of the Motion was offered by Stipulation (R. 74-75). This evidence included the written statements made to the police on the night of the shooting by the eyewitnesses to the offense (exhibit B, C and D at R. 74). In addition, the depositions of the three eyewitnesses were offered by Stipulation (Exhibits E, F and G at R. 75) as well as the transcript of the testimony of Mrs. Agee, one of the eyewitnesses, given at the preliminary hearing (Exhibit H at R. 75). Further, the appellant offered by Stipulation an accurate photocopy of the police artist's composite sketch of the gunman drawn at the direction of the eyewitnesses shortly after the shooting

(Exhibit A at R. 75).

The statement taken from Mr. Eric Agee on the night of the offense reveals that he described the gunman as being a white male, approximately 20 to 25 years of age, approximately 5'11" to 6' tall with a medium build and with a short growth of beard over his entire face. He further described the pistol used in the offense as being "at least a .38 caliber but less than a .45 caliber" (Defendant's Exhibit C at R. 74). The deposition taken of Mr. Agee further revealed that:

1. That the gunman had a full beard (page 18 of Exhibit G).

2. That he could not remember whether or not the gunman was wearing a shirt or whether he was wearing any shoes (page 20 of Exhibit G). That he was of the opinion that the gunman was not intoxicated (page 21 of Exhibit G).

3. Finally, he admitted that he never felt that he could identify the gunman and felt that he could not identify the gunman even on the date of the deposition, March 23, 1977 (page 24 of Exhibit G).

4. That the total time that he saw the suspect in view was from five to ten seconds (page 8 of Exhibit G).

5. That he was only looking at the gun which he believed at the time was a .38 caliber revolver (Page 9 of Exhibit G).

6. That the police artist sketch which he helped compile was accurate of the gunman that he saw (page 12 of Exhibit G).

7. That he could give a better description of the gun than he could of the gunman (page 17 of Exhibit G). That he couldn't describe the eyes, forehead or mouth of the gunman (page 18 of Exhibit G).

8. That there was nothing unusual about the gunman's chin, fingers, hands, clothing or voice (page 18-21 of Exhibit G).

On the night of the offense, Mrs. Bobbie Agee gave a written statement of identification stating that she was not positive that she could identify the man again if she saw him and that she remembered the gunman as being 5'11" to 6' and weighing 145 to 150 pounds and having an age of 24 to 25 years with shoulder length, wavy, brown hair and sideburns that came down and went into a short beard with a neat and well-trimmed mustache. (Exhibit D at R. 74).

The appellant established the following relative to Mrs. Agee's prospective identification testimony:

1. That the gunman had a beard over his entire face (page 15 of Exhibit E).

2. That she could not remember if the gunman was wearing a shirt and had no idea as to what type of shoes the gunman was wearing (page 17 of Exhibit E).

3. That after seeing a picture of the Defendant in the newspaper, she became convinced that the police artist sketch which she helped prepare was wrong (page 11 of Exhibit E).

4. That she did not remember anything unusual about the mouth, teeth, chin or complexion of the gunman (pages 14-15 of Exhibit E).

5. That she did not know the color of the gunman's eyes or anything about his hands (pages 15-16 of Exhibit E).

6. She further admitted that she and her husband were friends of the victim, Donna Parshall (page 27 of Exhibit H).

The appellant also offered evidence relative to the proposed identification testimony of Miss Pamela Bowman. The statement given by Miss Bowman on the night of the offense described the gunman as being between 5'7" and 5'8", 24 to 25 years old, medium to slender build and as having shoulder length, brown, wavy hair parted in the middle. (R. 74, Exhibit B). Her deposition testimony established the following:

1. That she could not tell whether or not the gunman had sideburns, beard or mustache (page 21 of Exhibit F). That she made no instructions to the police artist who composed the police artist sketch which were ignored (which depicted a man with a goatee) (page 12 of Exhibit F).

2. That Mr. and Mrs. Agee had identified another person as having been the gunman (page 13 of Exhibit F).

3. That she saw nothing indicating that the gunman was drunk (page 20 of Exhibit F).

4. That she had never seen the gunman before (page 20 of Exhibit F).

5. That she saw nothing remarkable about the gunman's forehead, chin, mouth or skin (page 21-23 of Exhibit F).

6. That she didn't notice the gunman's fingers, hands, color of eyes, teeth or whether he was wearing rings (page 22-23 of Exhibit F). That she noticed nothing unusual about the gunman's clothing or speech (page 24-25 of Exhibit F).

The appellant also offered into evidence the testimony of Detective Riddell in support of his motion in limine to suppress identification testimony. Detective Riddell was the Kansas City, Missouri Police Officer who asked the three eyewitnesses to look at a photospread which contained the appellant's picture. Detective Riddell admitted in his testimony that he knew that the Defendant had been arrested in Kansas on the night of the homicide or on the early morning following it and that the appellant had been arrested by the Johnson County Sheriff's Office in Kansas and a gun recovered from him (R. 78-79). He also admitted that he knew that Cody Higgins and Edward Bowman had been named by a confidential informant as the parties responsible for the offense (R. 78-79). He admitted that he knew this information at the time that he conducted the photospreads. He stated that he probably told Mr. Agee that the police had a particular suspect in mind and that he may have told Mr. Agee that the suspect had in fact been arrested that night. Nevertheless, it was his opinion that Mr. Agee was unable to make a positive identification of the Defendant from the photospread and, accordingly, he did not request Mr. Agee to make a statement of identification. (R. 84-85).

Detective Riddell admitted that he probably discussed the case with Mrs. Agee when showing her the photospread

and that he may have told her that the suspect which the police had had been arrested the night of the homicide (R. 86). Notwithstanding these conversations, it was his opinion that Mrs. Agee could not positively identify the appellant as having been the gunman (R. 88).

Detective Riddell was also responsible for showing the photospread to Miss Bowman. He admitted that he probably told Miss Bowman that the suspect which the police had in mind was arrested the night of the homicide but could not recall if he told her that the arrest took place in Kansas (R. 89). Miss Bowman made an identification of the appellant from the photospread and, accordingly, a statement of the identification was taken (R. 90-92).

The nature of the appellant's complaint as to the manner in which Detective Riddell's practices rendered the photospread inherently unreliable lies in the very nature of the photographs used in the photospread. The photographs used by Detective Riddell in the photospread consisted of appellant's Exhibits I, J, K, L and M which were introduced at R. 80. The photographs were in the nature of mug shots and, accordingly, contained on their face the name of the police agency which effected the arrest and the date that the mug shot was taken. Only the appellant's mug shot (Exhibit K), reveals the Kansas arrest made by the Johnson County Sheriff's Office on February 11, 1977, the date of the homicide. (Exhibits I, J, K, L and M at R. 80).

Upon hearing this evidence, the Trial Court overruled the appellant's motion in limine to suppress the identification testimony of Mr. and Mrs. Agee and Miss Bowman. Further, the Court overruled the appellant's motion for new trial which raised the allegation of error that the impermissibily suggestive practices conducted by the State had rendered the identification testimony patently unreliable and that its

introduction denied the appellant his right to a fair trial guaranteed to him under the due process clause of the Fourteenth Amendment of the United States Constitution.

How The Federal Questions Were Raised and Decided Below

Appellants Attack On The Constitutionality Of The Mandatory Life Sentence

Prior to trial, the appellant moved for a dismissal of the charge of first degree murder contained in the information for the reason that the mandatory punishment of life imprisonment constituted a violation of the doctrine of cruel and unusual punishment secured to him by virtue of the due process clause of the Fourteenth Amendment to the United States Constitution. (R. 22-23). The trial court overruled this motion (R. 38) and overruled the appellant's motion for a new trial which raised this same issue (R. 678).

On appeal, the Supreme Court of Missouri, en banc, stated as follows:

> Defendant first contends that the provisions of Section 559.009 (3), Revised Statutes Mo. Sup. 1975, prescribing a life sentence for conviction of first degree murder, constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution and Article I, Section 21 of our Missouri Constitution. Application of clearly established constitutional principles leads to rejection of this contention. (infr, Page 3-a - 4-a).

In this manner, the Supreme Court of Missouri, en banc, acknowledged the presentation of the question to it and explicitly and squarely rejected appellant's arguments that the penalty scheme was violative of the United States Constitution.

As to the issue of the admissibility of the identification

testimony, the Supreme Court of Missouri, en banc, recognized the appellant's assignment of error by noting that:

> Next defendant argues certain investigative techniques utilized by the police were so suggestive that they rendered defendant's in court identification by two eyewitnesses unreliable and the court's denial of the defendant's motion to suppress such identification testimony constituted reversible error. (infra, page 11a).

The majority opinion of the Missouri Supreme Court, en banc, authored by Judge Rendlen rejected appellant's attack on the admissibility of the identification testimony by stating:

> Having appraised the circumstances of the witnesses' identification process we conclude that their testimony was reliable and its admission not violative of the due process rights under either the Fourteenth Amendment, Article I, Section 21 of the Missouri Constitution. (infra, page 15a).

Judge Seiler rendered an opinion concurring in the result as there was evidence linking appellant to the crime other than the eyewitness identification. He did note in his opinion that the identification testimony had a strong aspect of police suggestion to it stating:

> I concur in result, as there is evidence linking defendant to the crime other than eyewitness identification which has a stong aspect of police suggestion to it. The example of this case, however, impels me to say something about eyewitness identification in general. Of the three eyewitnesses, one, Mr. Agee, did not identify defendant was the gunman and tentatively identified someone other than defendant. Mrs. Agee at first agreed with her husband in the tentative identification of someone else as the gunman and then when shown more photographs she and her husband still were not able to make a positive identification.
>
> Miss Bowman, according to Officer Riddell's own testimony, was probably told by him when he prepared to show her the photographs that the police had in mind a suspect who was arrested on the night of the homicide, February 11, 1977. In the five photographs shown Miss Bowman, the defendant's picture was the only one bearing the date 2-11-77. The figures stand out prominently in the photograph. They are about the same size as the length of the suspect's nose. As soon as she picked out defendant's photograph, the

Officer made "an exclamation of happiness," as she put it, and confirmed the fact that this was the suspect the police had in mind. This provided strong reinforcement for her opinion from an authority figure. Miss Bowman, incidently, was unable to say whether there was any hair on the fact of the man she saw come out of the store with the gun in his hand-no beard or mustache as she related to the police. Yet the photographs she selected shows defendant with a beard and mustache. The composite sketch of the suspect, which Miss Bowman helped create, showed a man with a beard and mustache. To some the sketch looks like defendant's photograph, to others it might not at all. (infra, pages 20-a - 21-a).

The Federal Questions are Substantial

Whether Section 559.009, R. S. Mo. (Supp. 1975), which establishes a mandatory punishment of life imprisonment for murder in the first degree violates the prohibition against cruel and unusual punishment guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution in that said mandatory punishment prohibits the sentencing court from utilizing enlightened discretion to insure that the sentence fits not only the circumstances of the offense, but also the character and propensities of the offender?

The cruel and unusual prohibition of the Eighth Amendment to the United States Constitution is applicable to state criminal proceedings as the right is so fundamental and essential that it is incorporated against the states by virtue of the due process clause of the Fourteenth Amendment. See, e.g., Louisana ex rel Francis vs. Resweber, 329 U. S. 459 (1947); Robinson vs. California, 370 U. S. 660 (1962). Appellant recognizes the prerogative of the legislature to define the conduct which incurs criminal liability and the range of punishment therefor as subject to limiting constitutional provisions. Traditionally, legislatures will define the appropriate punishment in terms of minimum and maximum parameters. Appellant contends that

the legislature by establishing parameters for punishment recognizes the unique ability of the judiciary to determine the appropriate punishment for those found guilty by taking into consideration the nature and circumstances of the particular offense and the defendant's character and circumstances.

It is the appellant's position that the mandatory life sentence imposed by Section 559.009, R. S. Mo. (Supp. 1975) violates the provisions of the Eighth and Fourteenth Amendment of the United States Constitution prohibiting cruel and unusual punishment. The rationale underlying this principle of law which has existed since the time of the magna carta is nothing less than the dignity of man. Trop vs. Dulles, 356 U. S. 86 (1958). It is a prohibition to insure that the state exercises its power to punish but within the limits of recognized civilized standards. Further, the meaning of the concept is not static for "the amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society", Id. at 101. It is the standard decency and justice in today's criminal justice system that "justice....requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender. His past may be taken to indicate his present purposes and tendencies and significantly to suggest the period of restraint and the kind of discipline that ought to be imposed upon him". Pennsylvania ex rel Sullivan vs. Ashe, 302 U. S. 51 at 55 (1937). The principle that a sentencing system must give consideration both to the offender and to the offense was recently re-stated in the decision of this

Court of Woodson vs. North Carolina, 428 U.S. 280 (1976). In this case, this Court struck down mandatory death penalties as being a cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Although this Court's decision was limited to the death penalty by virtue of its qualitative difference from sentences of imprisonment, the case nevertheless recognized that penalty statutes which preclude enlightened judicial discretion are not only in degradation of enlightened policy but violate the fundamental respect for humanity underlying the Eighth Amendment. Id at 304.

It is the appellant's position that these same principles are applicable to mandatory life sentences for they deny the court the opportunity to consider both the offender and the offense in order to arrive at a just and appropriate sentence. Although the Missouri Supreme Court, en banc, has apparently held that the trial court was not prohibited from granting probation, it is the appellant's position that such a construction of the first degree murder penalty statute by the Missouri Supreme Court does not save the penalty statute from constitutional scrutiny. With the alternatives of life imprisonment or probation, the appellant respectfully suggests that the discretion afforded the judiciary is too limited. In reality, the resulting sentences will be for life imprisonment not probation. Such a mandatory penalty scheme forces the judiciary to treat "all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass" to be subjected to the blind infliction of the previously mandated punishment. Id. at 304.

Further, the necessity of exercising judicial discretion in all cases has been recognized by the American Bar Association Project on Minimum Standards for Criminal Justice. These recommended standards provide that a legislature should not specify a mandatory sentence for any sentencing catagory or for any particular offense. The ABA Standards Sentencing Alternatives and Procedures, Section 2.1 (c) (1968). Further, these standards recognize the general principal of permitting judicial discretion so that each sentence imposed in a particular case can be individualized so that the minimum amount of custody or confinment which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant can be met. ABA Standards, Sentencing Alternatives and Procedures, Section 2.2 (1968). Further, it is noted in the introductory commentaries to the ABA Standards that whenever it "attempts to set the sentence prior to commission of the offense....leads to nullification of the law by the mitigating hands of prosecutors, judges and juries. Respect for law can hardly be induced by a system which demand that the law be ignored in order for the result to be just". ABA Standards, Sentencing Alternatives and Procedures, Introduction (1968).

Appellant concedes that the position adopted by the ABA Project on Standards for Criminal Justice are meant to be a model and not a minimum constitutional standard. Nevertheless, the standards recognize the enlightened penological purposes of sentencing from both the perspective of society and of the accused. It is, however, the appellant's position that a mandatory life sentence serves no purpose, except retribution. It is the appellant's position that while the purpose of the cruel and unusual punishment clause is not to insure enlightened penological theory that it nevertheless

prohibits punishments which cannot serve a valid penological function. Gregg vs. Georgia, 428 U.S. 152 (1976).

Accordingly, it is the appellant's position that the mandatory life sentence for first degree murder under Missouri law contravenes the Fourteenth Amendment to the United States Constitution.

Further this appeal presents the question of whether the identification testimony offered in the trial against the defendant violated the due process clause of the Fourteenth Amendment to the United States Constitution in that its reliability had been tainted by impermissible police suggestions.

Photographic identification procedures which are so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification denies the defendant of his right to a fair trial guaranteed to him under the due process clause of the United States Constitution. Simmons vs. United States, 390 U. W. 377 (1968). In order to secure the defendant this right, this Court has adopted a two step test to determine the reliability of in court identification which might be the product of a suggestive police practice. First, was the out of court confrontation or photospread suggestive? Second, assuming that it is, is the identification sufficiently reliable that it should be admitted before the jury? Neil vs. Biggers, 409 U. S. 188 (1972).

In applying the foregoing criteria to the facts of the instant case, it is the appellant's position that the trial court erred in failing to exclude the identification testimony. First, it is clear that the eyewitnesses did not have ample opportunity to view the gunman at the time of the crime. Secondly, the description of the gunman by the eyewitnesses given to the police is at variance with the photograph of the appellant taken on the night of the offense (defendant's Exhibit K). This is further evident from the disparity between the police artist's sketch (Exhibit A at R.75) and the photograph and is also evident from the inability of the eyewitnesses to describe the appellant. For example, Miss Bowman felt that the gunman was clean shaven and Mr. and Mrs. Agee believed that he had a full beard. Further, Mr. and Mrs. Agee could not identify the appellant following the photospread procedure, notwithstanding the suggestive practices of Detective Riddell. In fact, Mr. Agee could not identify the appellant even at trial (R. 281). Mr. and Mrs. Agee further mistakenly identified another as the gunman that they saw (page 13 of Defendant's Exhibit F; R. 292; R. 308).

It is the appellant's position that the confession by Detective Riddell that he probably told the eyewitnesses prior to the photospread that the police had a suspect in mind that had been arrested on the night of the homicide that constituted an impermissible police practice of suggestion of the kind condemned in United States Vs. Wade, 388 U. S. 218 at 233 (1967).

Given the foregoing facts, it is the position of the appellant that the identification testimony was sufficiently unreliable as to undermine its very admissibility under the test in Manson vs. Brathwaite, 432 U. S. 98 (1977). Accordingly, it is the appellant's position that the trial court erred in admitting the testimony and that the Missouri Supreme Court, en banc, erred in failing to set aside the judgment of conviction for the same reason.

Conclusion

It is respectfully submitted by the appellant that this court has jurisdiction of this appeal under Section 1257 (2), Title 28, U. S. Code. Accordingly, the appellant respectfully requests of this Court that probable jurisdiction be noted.

Respectfully Submitted,

James D. Boggs
Counsel for Appellant

CERTIFICATE OF SERVICE

As shown by the separately filed Certificate of Service, which lists the persons served with copies of this jurisdictional statement and its appendix, service has been made upon all parties of record.

James D. Boggs
Counsel for Appellant

Supreme Court of Missouri

en banc

DUPLICATE
OF FILING ON
DEC - 6 1979
IN OFFICE OF
CLERK SUPREME COURT

STATE OF MISSOURI,
Respondent,
v.
CODY V. HIGGINS,
Appellant.

No. 61285

APPEAL FROM THE CIRCUIT COURT OF CLAY COUNTY

Honorable Glennon E. McFarland, Judge

I

Convicted of first degree murder and sentenced to life imprisonment, defendant sought reversal in the Court of Appeals, Western District, but the cause was transferred here by that court on its own motion prior to opinion.[1] Considering the case as though on original appeal, we affirm.

A

The facts related by defendant in his written confession are these: On the evening of February 11, 1977, Higgins who had been

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[1] Apparently the Court of Appeals made the transfer in the view that appellant's attack on the facial validity of the mandatory life sentence provision of § 559.009, RSMo Supp. 1975 raised a question of constitutional construction falling within the exclusive jurisdiction of the Supreme Court, under Mo. Const. art. V, § 3 (effective date January 1, 1972, superseded January 2, 1979).

Although the appeal involves a claim of statutory invalidity, resolution of this issue requires only application of settled constitutional principles rather than construction of the United States Constitution or the Constitution of Missouri, State v. Motley, 546 S.W.2d 435, 438-439 (Mo. App. 1976); City of Florissant v. Rouillard, 495 S.W.2d 418, 420 (Mo. 1973) and accordingly does not fall within our exclusive jurisdiction. Nevertheless we retain the appeal in the interest of judicial economy. Rule 83.06. Foremost-McKesson, Inc. v. Davis, 488 S.W.2d 193, 196 (Mo. banc 1972).

drinking heavily, met his friend Eddie Bowman at an arcade on North Cherry Street in North Kansas City and announced that he was broke and wanted "to pull a robbery." He asked Bowman if he knew a place to rob where they wouldn't be seen. Bowman stated he did and they left in Higgins' station wagon to the North Kansas City suburbs where they settled on the Price-Rite Market on Northwest Waukomis for their proposed robbery. Armed with a .22 caliber revolver Higgins went into the store and taking the gun from his waistband, aimed it at the cashier Donna Parshall and twice demanded money. When Mrs. Parshall refused, Higgins shot her and she fell to the floor, fatally wounded. With some difficulty Higgins opened the cash door and took the money. As he was leaving an older man entered the store, whom Higgins ordered to stay back.

B

According to eyewitnesses at the scene, Higgins then encountered a Miss Bowman (no relation to Eddie) also on her way toward the store entrance and he pointed his gun at her head ordering her to stand aside. With the gun trained on her, Higgins moved around Miss Bowman's parked car, then fired a shot into the ground, walked from the parking lot and broke into a run along the highway.

C

Higgins stated in his confession that after the shooting he and Bowman proceeded to the latter's house where they divided the loot, about $140.00.

D

Later that evening Higgins, while driving erratically near Olathe, Kansas on Interstate 35, was stopped by Kansas Highway Patrolmen and when questioned stated he was out driving to sober up. An officer

closed the car door which Higgins left open in the traffic lane, and while so doing observed several beer cans in the car. One of the cans had been opened and was lying on the floor of the front seat with part of its contents spilled on the carpet. Three unopened beer cans were also lying on the floor. After placing defendant under arrest for driving while intoxicated the officer retrieved the cans from the car as evidence and at that time noticed the grips of a pistol protruding from beneath the driver's seat. He took the pistol, a 9-shot revolver, which contained eight live and one spent round of .22 caliber ammunition. Subsequent ballistics tests disclosed this was the murder weapon.

E

The Kansas City Police Department, acting on information from two confidential informants and three eyewitnesses, obtained a fugitive warrant for Higgins' arrest which was transmitted to police authorities in Bakersfield, California where Higgins was thought to have fled. At about 4:00 p.m. on February 16, 1977, Higgins and his companion Jeanette Olds were arrested outside of Bakersfield and the next day, two Kansas City detectives arrived to transport him to Missouri. Higgins, who had consulted with an attorney earlier in the day, waived his privilege against self-incrimination, confessed his involvement in the crimes[2] and waiving extradition was brought to Missouri for trial.

II

Defendant first contends that the provision of § 559.009(3), RSMo Supp. 1975,[3] prescribing a life sentence for conviction of first

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[2] Higgins also signed a written document denominated as a "Consent to Search" authorizing a search of his car and trailer.

[3] Section 559.009(3), RSMo Supp. 1975, applicable here, was repealed by the legislature, effective May 26, 1977, and replaced by the identical provision, § 565.008(2), RSMo 1978. The pertinent language is, "Persons convicted of murder in the first degree shall be punished by imprisonment by the division of corrections during their natural lives."

degree murder, constitutes cruel and unusual punishment in violation of the eighth and fourteenth amendments of the United States Constitution and art. I, § 21 of our Missouri Constitution. Application of clearly established constitutional principles leads to rejection of this contention.

The eighth amendment of the United States Constitution and art. I, § 21 of the Missouri Constitution mandate that the legislature exercise its power to punish for criminal offenses "within the limits of civilized standards." Woodson v. North Carolina, 428 U.S. 280, 288 (1975); Trop v. Dulles, 356 U.S. 86, 100 (1958).

While the framers of the federal constitution may well have sought only to prevent cruel and barbarous punishments amounting to torture, see Granucci, Nor Cruel and Unusual Punishments Inflicted: The Original Meaning, 57 Cal. L. Rev. 839 (1969) and though many cases[4] stress this aspect of eighth amendment protection, it has long been recognized that the eighth amendment is susceptible to broader application. Today it is clear that the eighth amendment forbids excessive as well as barbarous punishments. Coker v. Georgia, 433 U.S. 584, 592 (1977); State v. Mitchell, 563 S.W.2d 18, 26 (Mo. banc 1978); State v. Agee, 474 S.W.2d 817, 822 (Mo. 1971); State v. Motley, 546 S.W.2d 435, 438 (Mo. App. 1976). The ultimate question is whether the punishment is disproportionate to the crime for which it is imposed. Gregg v. Georgia, 428 U.S. 153, 187 (1975). State v. Agee, 474 S.W.2d 817, 822 (Mo. 1971); State v. Johnson, 549 S.W.2d 348, 352 (Mo. App. 1977). When determining the constitutionality of legislatively prescribed punishment it must first be noted that we presume its validity and those who seek invalidation bear a heavy burden of demonstrating that the statutory punishment is barbarous or

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[4] See Wilkerson v. Utah, 99 U.S. 130 (1878) and In re Kemmler, 136 U.S. 436 (1890).

excessive.[5] Gregg v. Georgia, 428 U.S. 153, 175 (1975); State v. Mitchell, 563 S.W.2d 18, 26 (Mo. banc 1978). Defendant has failed to meet that burden.

No crime is so disruptive of peace and order or more violative of the rights of the individual than murder. The security and lives of its members are the first objects of organized society and we cannot say that the legislature erred in punishing with a mandatory term of life imprisonment those who intentionally take life or kill in the course of a felony. An examination of the legislative enactments of other states supports this view. More than two-thirds of our sister states attach a penalty of mandatory life imprisonment to the crime of first degree murder.[6] While such a "headcount" is not controlling, the fact that a strong majority of jurisdictions have also adopted mandatory life sentences for first degree murder, lends credence to the view that our legislature's action is neither excessive nor capricious.[7]

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[5] The United States Supreme Court recently stated, "[L]egislatures remain free to decide how much discretion in sentencing should be reposed in the judge or jury in non capital cases*** Lockett v. Ohio, 438 U.S. 586, 603-604 (1976).

[6] Those states are: Alabama, Ala. Code tit. 13, § 1-74; Arizona, Ariz. Rev. Stat. § 13-703; Colorado, Colo. Rev. Stat. § 18-3-102(3) and § 18-1-105, Delaware, Del. Code tit. 11, § 4209; District of Columbia, D.C. Code § 22-2404; Florida, Fla. Stat. § 921.141; Georgia, Ga. Code § 26-1101; Idaho, Idaho Code § 18-4004; Iowa, Iowa Code § 707.2 and § 902.1; Kansas, Kan. Stat. § 21-4501; Louisiana, La. Rev. Stat. Ann. § 14.30 (West); Maryland, Md. Crim. Law Code Ann. § 27-412, Massachusetts, Mass. Gen. Laws. Ann. ch. 265, § 2 (West); Michigan, Mich. Stat. Ann. § 750.316; Minnesota, Minn. Stat. Ann. § 609.185 (West); Mississippi, Miss. Code Ann. § 97-3-21; Nebraska, Neb. Rev. Stat. § 28-401; Nevada, Nev. Rev. Stat. § 200.030(4); New Hampshire; N.H. Rev. Stat. Ann. § 630:1-a; New Mexico, N.M. Stat. Ann. § 31-18-2; North Carolina, N.C. Gen. Stat. § 14-17; Ohio, Ohio Rev. Code Ann. § 2929.02; Oklahoma, Okla. Stat. tit. 21, § 701.9; Pennsylvania, 18 Pa. Cons. Stat. Ann. § 1102; Rhode Island, R.I. Gen. Laws § 11-23-2; South Carolina, S.C. Code § 16-3-20; South Dakota, S.D. Compiled Laws Ann. § 22-16-12 and § 22-6-1; Tennessee, Tenn. Code Ann. § 39-2402; Utah, Utah Code Ann. § 76-5-202 and 76-3-206; Vermont, Vt. Stat. Ann. tit. 13, § 2303; Washington, Wash. Rev. Code § 9A-32.040; West Virginia, W.Va. Code § 61-2-2; Wisconsin, Wis. Stat. Ann. § 940.01 and § 939.50; Wyoming, Wyo. Stat. § 6-4-101.

[7] At least three jurisdictions have prescribed mandatory sentences for offenses less serious than murder. Texas, Tex. Penal Code Ann. tit. 1 § 12.42(d) and West Virginia, W.Va. Code § 61-11-18 impose mandatory life sentences on thrice convicted recidivist felons. New York has a mandatory life sentence for all class A drug felonies. N.Y. Penal Law § 70.00-2(a) (McKinney).

No cases have been suggested and none have been found holding a mandatory life sentence for murder violates those provisions of the Missouri or the federal constitutions.[8] The Minnesota Supreme Court, declaring that a mandatory life sentence for the crime of murder did not constitute cruel and unusual punishment, stated further that such sentences serve the legitimate legislative purpose of assuring that violent offenders do not return to society prematurely. State v. Walker, 306 Minn. 105, 235 N.W.2d 810, 814-815 (Minn. 1975), cert. denied, 426 U.S. 950 (1976).

Finally, because the death penalty may be prescribed for murder, Gregg v. Georgia, 428 U.S. 153 at 187 (1976), it follows that the penalty of mandatory life imprisonment for this most heinous of crimes is constitutionally permissible. We hold that § 559.009(3), RSMo Supp. 1975 does not constitute cruel and unusual punishment in-so-far as it prescribes a mandatory sentence of life imprisonment for convictions of first degree murder.

III

Defendant next contends the mandatory sentence of life imprisonment provided by § 559.009, RSMo Supp. 1975 violates Missouri Constitution art. II requiring the separation of governmental power[9] by interfering with an inherent judicial power to exercise discretion and to impose

[8] Several courts have recently upheld mandatory life sentences for less serious crimes in the face of eighth amendment challenges. New York's mandatory life sentence for all class A drug felonies was sustained in People v. Broadie, 37 N.Y.2d 100, 371 N.Y.S.2d 471, 332 N.E.2d 338 (N.Y. 1975), cert. denied, 423 U.S. 950 (1975); Carmona v. Ward, 576 F.2d 405 (2d Cir. 1978), cert. denied, 439 U.S. 1091 (1979).

[9] Art. II of the Missouri Constitution has been retained unchanged in all crucial aspects since the adoption of Missouri's original (1820) Constitution.

only such punishment as the Court may deem appropriate.[10] Such has never been the law of this State and, as we shall presently discuss, is supported by scant authority elsewhere.

It has been consistently held that fixing punishment for a crime defined by statute is the province of the legislature, not the courts. State v. Alexander, 315 Mo. 199, 285 S.W. 984, 985 (Mo. 1926); State v. Wheeler, 318 Mo. 1173, 2 S.W.2d 777, 779 (Mo. 1928); State v. Motley, 546 S.W.2d 435, 437 (Mo. App. 1976); see cases cited, Missouri Digest under Constitutional Law, Key Number 70.1(10). Indeed, if we were to hold that the Court could assess a punishment not authorized by statute, it would constitute an usurpation of legislative authority. The consequences of such a position were perceived more than half a century ago by the United States Supreme Court in Ex parte United States, 242 U.S. 27, 42 (1916), which stated:

> [I]f it be that the plain legislative command fixing a specific punishment for crime is subject to be permanently set aside by an implied judicial power upon considerations extraneous to the legality of the conviction, it would seem necessarily to follow that there could be likewise implied a discretionary authority to permanently refuse to try a criminal charge because of the conclusion that a particular act made criminal by law ought not to be treated as criminal. And thus it would come to pass that the possession by the judicial department of power to permanently refuse to enforce a law would result in the destruction of the conceded powers of the other departments, and hence leave no law to be enforced.

10

Defendant also appears to argue that mandatory sentencing provisions invade an inherent judicial power to grant probation, though it has been held that the power to grant probation derives from legislative authorization and is not inherent to the judicial power. State v. Motley, 546 S.W.2d 435, 437 (Mo. App. 1976). However, we need not reach that issue here. Section 549.061, RSMo 1978, authorizes circuit courts to grant probation in all cases except for certain recidivist drug offenders and those convicted of capital murder. Higgins was convicted of first degree murder and no statute prevented the trial court from granting probation in such cases.

Notwithstanding this line of authority defendant would have us hold otherwise and relies on State v. McCoy, 94 Idaho 236, 486 P.2d 247 (1971), to support his position.[11] McCoy involved an Idaho statute requiring a minimum 10 day sentence upon conviction for driving under the influence of intoxicating liquors. 486 P.2d at 248. The Idaho Court concluded that the judiciary possessed the power under the English common law to suspend sentence. Pressing on, the Idaho court discovered that the power to suspend all or any part of a sentence, "is in the nature of an inherent right of the judicial department and one which the separation of powers concept places above and beyond the rule of mandatory action imposed by legislative fiat." 486 P.2d 247 at 251. We reject the result and rationale of that decision.

In Missouri it has been recognized that the judiciary has no power, absent legislative authority to indefinitely stay execution of sentence, Ex parte Thornberry, 300 Mo. 661, 254 S.W. 1087, 1090 (Mo. banc 1923); State ex rel. Oliver v. Hunt, 247 S.W.2d 969, 973 (Mo. banc 1952), and this court is neither authorized nor willing to substitute its "enactments" on the basis of judicial predilections as to sentencing for the statutes of the legislature.

Mr. Justice Frankfurter noted, in response to a similar contention, that "In effect we are asked to enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment. Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility [citations omitted] these are peculiarly questions of legislative policy." Gore v. United States, 357 U.S. 386, 393 (1958).

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[11] The McCoy decision has been the object of much criticism even within Idaho. See McMeen, The Constitutional Power of Idaho Courts to Suspend Sentence: The Uncertain Meaning of State of Idaho v. McCoy, 11 Idaho L. Rev. 29 (1974); State v. Lindquist, 99 Idaho 766, 589 P.2d 101, 110 (1978) (dissenting opinion).

We hold that § 559.009(3), RSMo Supp. 1975 did not violate art. II of the Missouri Constitution and that a contrary position would improperly inject the courts into the legislative province.

IV

For his next contention defendant states the trial court erred in denying his motion to suppress and allowing his confession (given to the Kansas City police detectives at the Kern County jail in Bakersfield, California) to be admitted in evidence. He argues the confession was involuntary and obtained in violation of the fifth, sixth and fourteenth amendments to the United States Constitution as well as art. I, § 18(a) and 19 of the Constitution of the State of Missouri. Further, that the Uniform Criminal Extradition Act was violated by the circumstances of his transportation from California to Missouri for trial.

Although the issue of voluntariness is necessarily a mixed question of law and fact, we first give due regard to the trial court's opportunity to judge the credibility of the witnesses (Rule 73.01(3)(b), applicable in criminal appeals by Rule 28.18) and in that frame of reference determine whether the trial court's finding of voluntariness is supported by substantial evidence. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976).

At the outset we recognize that once a defendant has challenged the admissibility of a statement or confession made while in police custody, the burden is on the state to demonstrate its elicitation comported with controlling constitutional requirements and that the statement was voluntarily made. State v. Olds, 569 S.W.2d 745, 751 (Mo. App. 1978); Lego v. Twomey, 404 U.S. 477, 489 (1977).

The test for "voluntariness" is whether the totality of the circumstances deprived defendant of a free choice to admit, to deny, or to refuse to answer, and whether physical or psychological coercion was of such a degree that defendant's will was overborne at the time

he confessed. As the United States Supreme Court recently noted the rubric of voluntariness has, "reflected an accommodation of the complex of values implicated in police questioning of a suspect." Schneckloth v. Bustamonte, 412 U.S. 218, 224-225 (1973). Important to such inquiry is the presence or absence of advice concerning the defendant's constitutional rights. State v. Glenn, 429 S.W.2d 225, 232-233 (Mo. banc 1968).

Here, despite defendant's protestations that the statement was coerced by promises of benefit and threats of harm, there is substantial evidence to support the finding that it was in fact voluntary. Higgins admitted that prior to his statement he was advised of his rights by the Miranda warning, that he understood those rights, and nevertheless spoke with the officer. While the presence or absence of Miranda warnings is not the sole criterion of voluntariness it is an important fact to consider. State v. Glenn, 429 S.W.2d at 233. The apparent voluntariness is enhanced by the fact that Higgins had spoken with an attorney prior to making his statement. Further, defendant's testimony on this matter is replete with inconsistencies and when compared to the specific denial of any coercive practices by the detectives, we defer to the trial court's action stemming from the apparent belief that the state's evidence was more credible. State v. Anderson, 384 S.W.2d 591, 604 (Mo. banc 1964). We find the court's denial of the motion to suppress and admission of the statement in evidence were not error.

Finally, defendant would have us rule that the violation of the Uniform Criminal Extradition Act, § 548.011 et. seq., RSMo 1978, mandates exclusion of all subsequent statements. We do not reach this novel contention because the Act was not violated. The Act provides: "[N]othing in this section shall be deemed to limit the rights of the accused person to return voluntarily and without formality to the demanding state; nor shall this waiver procedure be deemed to be the

exclusive procedure or to limit the powers, rights, or duties of the officers of the demanding state or this state." § 548.260(2), RSMo 1978; Cal. Penal Code § 1555.1 (West). The record discloses no violation. Instead the credible testimony demonstrated that defendant voluntarily waived extradition procedures and of his own free will accompanied the officers to Missouri. The contention is denied.

V

Next defendant argues certain investigative techniques utilized by the police were so suggestive that they rendered defendant's in-court identification by two eyewitnesses unreliable and the court's denial of defendant's motion to suppress such identification testimony constituted reversible error.

As defendant fled the store where the robbery and murder occurred, he was seen by three customers, Mr. Agee, Mrs. Agee and Miss Bowman, each of whom signed a written statement the night of the homicide. The next day, all participated in the creation of a composite drawing and while none was completely satisfied with the drawing produced by the police artist it bears a remarkable resemblance with defendant's photograph.

The following day, Sunday, February 13, all three went to the sheriff's office in Liberty to view photographs. Although they were unable to make a positive identification, Mr. and Mrs. Agee tentatively identified a photo of a man who was not Cody Higgins as resembling the gunman.

Later that day Officer Riddell of the Kansas City Police Department showed an array of 5 photos to the witnesses. Mr. and Mrs. Agee were shown the photos by placing them upon a counter and both looked at them closely. Mr. Agee was unable to make a positive identification. Mrs. Agee selected Higgins picture but she too was unable to make a positive identification. Riddell could not remember what he told Mrs.

Agee before showing her the photos, but Mrs. Agee was certain that Riddell did not say that the "police had in fact arrested a suspect the night of the homicide . . . . "

Riddell displayed the photo spread array to Miss Bowman at her place of employment. Although he was unsure, he stated that he probably told her that police had in mind a suspect who was arrested the night of the homicide. She recalled only that Riddell stated he had pictures he wanted her to view. Riddell set five pictures on a console as Miss Bowman's back was turned, she then turned around and almost immediately selected Higgins' photograph from the array. It was not until after her identification of defendant's photograph th Riddell told her the picture selected was that of the suspect the police had in mind. While Mr. Agee testified at trial, only Mrs. Agee and Miss Bowman identified Higgins in court.

Utilization of photographs can be a valuable and proper aid to identification or release of suspects in police investigatory procedures. "Despite the hazards of initial identification by photograph, this procedure has been used widely and effectively in criminal law enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing witnesses to exonerate them through scrutiny of photographs." Simmons v. United States, 390 U.S. 377, 384 (1967). The danger to be guarded against is that, "photographic identification procedure [will be] so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Id. at 384 (1967). (Emphasis supplied.) State v. Parker, 458 S.W.2d 241, 243 (Mo. 1970). Whether this danger exists in a particular case depends on the totality of the surrounding circumstances. Simmons v. United States, 390 U.S. 377, 384 (1967); Stovall v. Denno, 388 U.S. 293, 302 (1966); State v. Parker, 458 S.W.2d 241, 244 (Mo. 1970).

The resolution of this issue requires a two-step analysis. Were the investigative procedures employed by the police impermissibly

suggestive? If so, were they so impermissibly suggestive as to create a very substantial likelihood of an irreparable misidentification at trial? State v. Charles, 542 S.W.2d 606, 609 (Mo. App. 1976). State v. McDonald, 527 S.W.2d 46, 49 (Mo. App. 1975). The answer to both questions in the case sub judice is in the negative, hence defendant's contention is not well taken.

Examining the "totality of the circumstances," Stovall v. Denno, 388 U.S. at 302, we cannot agree that the photo spread techniques employed here were impermissibly suggestive. An array of 5 photographs (apparently "mug shots") were exhibited to the witnesses. Each showed a young Caucasian male with long hair with similar styles of facial hair. According to Bowman, the photo of Higgins' had been placed in one of the three middle positions. The only aspect of suggestiveness we discern from the record is that Detective Riddell may have informed Bowman that the police had in mind a suspect arrested on the night of the offense and that Higgins' mug shot bore a corresponding date. Bowman had no recollection such a statement was made and Riddell's testimony is inconsistent on the point. If it in fact occurred the statement had no measurable effect as Miss Bowman identified Higgins immediately when she turned and saw the photographs.

Assuming arguendo the photo spread techniques were impermissibly suggestive, we find no want of due process in the trial court's rulings on the identification testimony. Reliability, not suggestiveness, "is the linchpin for determining the admissibility of identification testimony . . . . " Manson v. Brathwaite, 432 U.S. 98, 114 (1977); State v. Carter, 572 S.W.2d 430, 435 (Mo. banc 1978) and reliability of the in-court identification testimony is to be assessed under the

"totality of the circumstances."[12] Neil v. Biggers, 409 U.S. 188, 199 (U.S. 1972); State v. Carter, 572 S.W.2d 430, 435 (Mo. banc 1978); State v. Charles, 542 S.W.2d 606, 609 (Mo. App. 1976). Factors to be considered include: (1) The opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. Neil v. Biggers, 409 U.S. 188, 199-200 (1972).

Mrs. Agee and Miss Bowman had ample opportunity to view defendant. Mrs. Agee saw him through the plate glass window of the well lighted store and as he exited pursuing a circuitous route through the well lighted parking lot.[13] She observed the gunman between 5 and 10 seconds. Miss Bowman arrived as the gunman was coming from the store, he pointed a gun at her head, told her to stay back, and walked around her vehicle firing a shot into the ground as he passed. He was at most 20 to 25 feet from Miss Bowman and she had a clear view as "he was looking straight at [her]." The gunman's movements and physical features were readily perceived by both women and their detailed description of defendant's physical features, clothing, and movements demonstrated that each observed the questioned events with the highest level of attention. Moreover, the witnesses' descriptions of the gunman

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12 Defendant's reliance on United States v. Wade, 388 U.S. 218, 219-220 (1967) and Gilbert v. California, 388 U.S. 263, 269 (1967) is misplaced. Those cases involved post-indictment lineups conducted in the absence of counsel and are distinguishable on that basis. State v. Bibbs, 461 S.W.2d 755, 757 (Mo. 1970); State v. Townes, 461 S.W.2d 761, 763 (Mo. 1970), cert. denied, 407 U.S. 909 (1972). Moreover, in Wade at 388 U.S. at 240-241, and Gilbert at 388 U.S. at 272, the Court refused to adopt a per se exclusionary rule for the admissibility of in-court identifications of the sort challenged here. Further, in this case the suggestive confrontation techniques detailed in Wade are not present.

13 The store lights were burning, there were lights in front of the store, a street light illuminated the parking lot, and Miss Bowman's car lights were on.

were remarkably consistent from the time of their original statement on the night of the murder, through their collaboration on the composite drawing, to their testimony at trial. While a testimonial discrepancy appears concerning defendant's facial hair, this may be explained by the fact that Higgins admitted he had about a day's growth of facial hair on the date of the offense. Whether Higgins had a "beard" or was "clean shaven" became a question for the jury to weigh.

Pamela Bowman evidenced a high degree of certainty in her identification of Higgins' photograph. When shown the array she immediately identified Higgins as the gunman. Mrs. Agee tentatively identified someone other than Higgins as the gunman two days after the incident. Then two days later she made a tentative identification of Higgins. Because of her otherwise detailed and consistent identification testimony and her observation of Higgins at the scene her positive in-court identification was not rendered inadmissible. State v. Cummings, 445 S.W.2d 639, 642 (Mo. 1969). When asked at trial if it was possible for other persons to have the same description as that she had given the police she replied, "The same description but not the same face."

The fact that Mr. Agee did not testify at trial does not vitiate the admissibility of the other witnesses' identification testimony. State v. Knox, 529 S.W.2d 455, 462 (Mo. App. 1975).

As Miss Bowman positively identified Higgins within a week and Mrs. Agee made her tentative identification within that period, the time lag cannot be said to have destroyed the reliability of their testimony. Having appraised the circumstances of the witnesses' identification process we conclude that their testimony was reliable and its admission not violative of due process rights under either the fourteenth amendment, art. 1, § 21 of the Missouri Constitution.

Finally, it should not go unnoted that defendant in his confession not only admitted his presence at the scene but detailed the facts leading to and from as well as his performance of the act of murder.

VI

It is next asserted that the search of defendant's automobile and the seizure of the murder weapon violated rights guaranteed defendant under the fourth amendment to the United States Constitution and art. I, § 15 of the Missouri Constitution. See I-D above for a discussion of the relevant facts.

The officers had probable cause to stop the car, to believe Higgins was driving while intoxicated and seize the beer cans then in open view on the floor of the stopped vehicle. See Harris v. United States, 390 U.S. 234, 236 (1968); State v. Achter, 512 S.W.2d 894, 903 (Mo. App. 1974). The inadvertent discovery of the pistol was not the result of a search. Instead, as in State v. Rankin, 477 S.W.2d 72, 75 (Mo. 1972), the pistol was observed in "plain view" by officers entitled to be where they were. Thus no search in the constitutionally prohibited sense occurred. The contention is meritless.

VII

At the close of the evidence the trial court refused a proffered, non-MAI "identity" instruction and defendant complains of that refusal.[14] For some years it has been the rule that whether to give a separate cautionary instruction on the issue of identity is a matter resting in the sound discretion of the trial court. State v. Collor, 502 S.W.2d 258, 259, (Mo. 1973); State v. Taylor, 472 S.W.2d 395, 402 (Mo. 1971). A claim such as that at bar was made in State v. Thomas, 541 S.W.2d 775, 777 (Mo. App. 1976), which the court rejected because (a) there was sufficient believable identification testimony and (b) the importance of identity and the dangers of misidentification were extensively dealt with during direct examination, cross-examination and argument to the jury.

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[14] The proffered instruction appears in an opinion by the Court of Appeals, D.C., United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972).

Here extensive direct and cross-examination occurred on the issue of identity and the possibility of misidentification. Further the question of identification was extensively argued to the jury. For these reasons we find no error. Moreover, the court was justified in its action because the tendered identity instruction was not " . . . simple, brief, impartial, and free from argument" as required by Rule 20.02(d). State v. Sloan, 575 S.W.2d 836, 837 (Mo. App. 1978). There was no abuse of discretion in the trial court's refusal to give the proffered non-MAI instruction. Id.

VIII

Defendant insists the court erred in overruling his motion for disclosure as to confidential informants. Roviaro v. United States, 353 U.S. 53 (1957), described a governmental privilege protecting the anonymity of informants and indicated that the boundaries of this privilege would require a case by case balancing of the public interest in encouraging the provision of information to the police against the defendant's right to prepare his defense. In this case we have reviewed the in-camera testimony concerning the information provided the Kansas City police by the confidential informants. The informants neither witnessed nor participated in the actions preliminary to or the commission of the crime. The information provided was based principally on hearsay and the overhearing of statements of the defendant going solely to the question of probable cause for issuance of an arrest warrant. In McCray v. Illinois, 386 U.S. 300, 312-313 (1967), it was stressed that an informant's identity need not be disclosed when his testimony solely went to procedural aspects of the criminal proceedings, such as the presence of probable cause. We find no abuse of discretion in the trial court's denial of the request to disclose the confidential informant's identity. State v. Redding, 357 S.W.2d 103, 108 (Mo. 1962); State v. Edwards, 317 S.W.2d 441, 447 (Mo. banc 1958).

IX

Defendant next contends the trial court erred by admitting in evidence photographs of the body of the victim which he claims were gruesome and prejudicial. The holding in State v. Ford, 585 S.W.2d 472 (Mo. banc 1979) is appropriate here. The photos were a true and accurate representation of the objects and scene represented and were relevant to issues of fact, hence the fact they are characterized by the defense as gruesome does not in itself render the photos inadmissible. The murder produced a dead person and the photographs in question go to that fact. Id. at 474. We have examined the photos of the corpse and while they could be described as grisly they are relevant to various elements in the charge. They establish the identity of the body upon which the autopsy was performed as well as the nature and location of the wounds. They also demonstrate that the victim was indeed shot and are corroborative of the pathologist's testimony as to the cause of death. The nature and location of the wounds are relevant to questions of intent and defendant's state of mind pertinent to the three levels of homicide submitted by the instructions. The question of mens rea was crucial. Having determined that the probative value of the photographs was substantial and that this probative value was not outweighed by the claimed prejudice, we conclude that the trial judge did not abuse his discretion in admitting the photographs into evidence.

X

Defendant also argues his conviction should be reversed because of a technical defect in the information charging him with first degree murder which miscited the statutory sections defining the offense and prescribing the punishment. While Rule 24.01(a) requires

the citation of the sections of the Revised Statutes for the offense charged and its punishment, Rule 24.11[15] provides that no judgment of conviction shall be affected unless substantial rights of the defendant are prejudiced on the merits as a result of the flaw in the information.

As the language of the information clearly connotes that defendant was charged with first degree murder and defendant's counsel was aware before trial of the offense charged and the prescribed punishment, we find no prejudice to defendant resulted.

XI

Finally defendant asserts the evidence was insufficient for conviction because the trial court erred in overruling appellant's judgment for acquittal. This point is meritless. We need but mention the identification testimony of the eyewitnesses that Higgins was the gunman, the ballistics test which demonstrated the weapon which killed Miss Parshall was the weapon possessed by defendant when stopped some three hours later and, of course, defendant's detailed confession to the crime. Affirmed.

ALBERT L. RENDLEN, Judge

Bardgett, C.J., Donnelly, Welliver, JJ., Welborn, Sp.J., and Finch, Sr.J., concur; Seiler, J., concurs in result in separate opinion filed; Morgan, J., not sitting; Higgins, J., not participating because not a member of the Court when cause was submitted.

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15 Rule 24.11 provides in relevant part:

> No indictment or information shall be deemed invalid, nor shall the trial, judgment or other proceedings thereon be stayed, arrested or in any manner affected: . . . for any surplusage or repugnant allegation when there is sufficient matter alleged to indicate the crime and person charged . . . for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits. . . .

Supreme Court of Missouri

en banc

DUPLICATE
OF FILING ON
DEC-6 1977
IN OFFICE OF
SUPREME COURT

STATE OF MISSOURI,)
Respondent,)
v.) No. 61285
CODY V. HIGGINS,)
Appellant.)

OPINION CONCURRING IN RESULT

I concur in result, as there is evidence linking defendant to the crime other than eyewitness identification which has a strong aspect of police suggestion to it. The example of this case, however, impels me to say something about eyewitness identification in general. Of the three eyewitnesses, one, Mr. Agee, did not identify defendant as the gunman and tentatively identified someone other than defendant. Mrs. Agee at first agreed with her husband in the tentative identification of someone else as the gunman and then when shown more photographs she and her husband still were not able to make a positive identification.

Miss Bowman, according to officer Riddell's own testimony, was probably told by him when he prepared to show her the photographs that the police had in mind a suspect who was arrested the night of the homicide, February 11, 1977. In the five photographs shown Miss Bowman, defendant's picture was the only one bearing the date 2-11-77. The figures stand out prominently in the photograph. They are about the same size as the length of the suspect's nose. As soon as she picked out defendant's photograph, the officer made "an exclamation of happiness," as she put it, and confirmed the fact that this was the suspect the police had in mind. This provided

strong reinforcement for her opinion from an authority figure. Miss Bowman, incidentally, was unable to say whether there was any hair on the face of the man she saw come out of the store with the gun in his hand - no beard or moustache as she related it to the police. Yet the photograph she selected shows defendant with a beard and moustache. The composite sketch of the suspect, which Miss Bowman helped create, showed a man with a beard and moustache. To some the sketch looks like defendant's photograph, to others it might not at all.

It is true that the requirements of the Wade-Gilbert-Stovall cases have been limited to apply to post-indictment lineups, but the concern which gave rise to those opinions is the "very real danger of mistaken identification as a threat to justice." United States v. Telfaire, 469 F.2d 552, 555 (D.C. Cir. 1972). That danger can exist before as well as after indictment. In the Wade case, the majority opinion quoted Mr. Justice Frankfurter as saying "What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials." The opinion goes on to say: "A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification . . . Suggestion can be created intentionally or unintentionally in many subtle ways . . . ", United States v. Wade, 388 U.S. 218, 228-29 (1967).

A note in a recent law review, Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification, 29 Stan. L. Rev. 969 (1977) discusses the psychology of testimony and scientific studies on the fallibility of perception, the unreliability of memory and the inaccuracy of

eyewitness testimony. It discusses perceptual selectivity, time perception, poor observation conditions, stressful situation, expectancy, personal needs and biases, cross-racial identification, memory decay over time, filling gaps in memory, inadequacy of verbal descriptions, suggestion in the composition and administration of an identification test, and social psychological influences.

I believe it is worthwhile to quote certain concluding passages of the article (29 Stan. L. Rev. at 1028-29):

> For years, members of the legal community have suspected that mistaken eyewitness identifications often send innocent people to prison and even death. Psychological research data amassed over the past 80 years confirm the unreliability of much eyewitness testimony: Psychologists can now point to a large number of cognitive and social factors that subtly but powerfully distort a witness' perception, memory and recall of an event. Moreover, many of these factors repeatedly arise in criminal cases yet do not suggest themselves intuitively to jurors as causes for doubting the reliability of identification evidence. In fact, jurors often rely unquestioningly on eyewitness identifications as the most trustworthy evidence available.
>
> Although courts long have recognized these dangers, they have done little to reduce the likelihood of such miscarriages of justice. The Supreme Court tackled only a relatively minor portion of the problem when, in the landmark Wade trilogy, it afforded the right to counsel and due process protection to pretrial identification procedures. Moreover, in the years since those decisions, the Court has qualified the principles they embodied so thoroughly that the protection now offered to the criminal defendant is minimal at best.
>
> Other safeguards that the criminal justice system provides also fail adequately to protect the defendant from wrongful conviction due to inaccurate eyewitness testimony. No amount of cross-examination can reveal the numerous suggestive influences that subtly bias the recollections of an honest but mistaken witness, and even the most eloquent of closing arguments will not persuade a jury to disregard sincere and apparently truthful eyewitness testimony. Similarly, cautionary jury instructions, even when they effectively focus the jurors' attention on the identification issue, do not provide them with any information with which to evaluate its worth. The remedies of exclusion and corroboration, on the other hand, go too far and undoubtedly would lead to the acquittal of many truly guilty defendants.
>
> This Note proposes another safeguard: the admission at trial of expert testimony on the cognitive and social factors affecting the reliability of eyewitness identification evidence. When used in conjunction with the traditional devices of cross-examination, closing argument and jury instructions, the psychologist's testimony can help the trier of fact to apply the scientific information on the process of perception, memory and recall to the case at hand in order to evaluate meaningfully the eyewitness evidence.
>
> Finally, the psychologist's expert testimony satisfies the traditional standards and principles governing the admission of expert testimony. In fact, the amount and quality of psychological research in this area has progressed to the point at which courts can no longer afford to ignore totally the development of experimental psychology as a science, at least when the liberty and even lives of criminal defendants hang in the balance.[1]

Robert E. Seiler, Judge

1. A footnote at this point in the article gives use of radar in speed detection devices as an example of the evolutionary process in use of evidence of scientific nature. At first the courts were unwilling to accept the devices as having sufficient scientific accuracy. Now many courts take judicial notice that radar is sufficiently reliable so as to dispense with proof of its general scientific reliability.

IN THE SUPREME COURT OF THE STATE OF MISSOURI

CODY V. HIGGINS — APPELLANT

DUPLICATE
OF FILING ON
DEC 27 1979
IN OFFICE OF
CLERK SUPREME COURT

VS. — NO. 61285

STATE OF MISSOURI — APPELLEE

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Cody V. Higgins, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Missouri, en banc, affirming the judgment of conviction and sentence to life imprisonment of the appellant on charges of first degree murder entered herein on December 6, 1979.

This appeal is taken pursuant to 28 U.S.C. Sec. 1257 (2).

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CERTIFICATE OF SERVICE

I, James D. Boggs, Attorney for Cody V. Higgins, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 21st day of December, 1979, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on the Appellee, State of Missouri, by mailing a copy in a duly addressed envelope, with first class postage prepaid, by depositing the same in a United States Post Office addressed to the Honorable John Ashcroft, Attorney General for the State of Missouri, Post Office Box 899, Jefferson City, Missouri 65101.

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